UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, a Federally Recognized Indian Tribe,

Plaintiff,

v.

KEVIN GOVER, in his official capacity as Assistant Secretary for Indian Affairs, UNITED STATES DEPARTMENT OF THE INTERIOR, and THE UNITED STATES OF AMERICA,

Defendants.
_____/

CASE NUMBER: 99-10327

HONORABLE VICTORIA A. ROBERTS

ORDER DENYING TEMPORARY RESTRAINING ORDER

I.

This matter is before the Court on Plaintiff's Motion for a Temporary Restraining Order ("TRO"). Defendants have responded, and the Court heard extensive oral argument on Wednesday, August 18, 1999. For the reasons set forth below, the Court **DENIES** Plaintiff's Motion.

II.

Plaintiff is comprised of the incumbent Tribal Council ("TC") of the Saginaw Chippewa Tribe. The Tribal Constitution provides that the TC is to be elected every two years. However, the Tribe has been having serious election disputes and related disputes regarding membership. Relying on the

Election Code,[1] the incumbent TC has nullified four of the past five general and primary elections. More specifically, the following elections have been invalidated:

(1) October 14, 1997 Primary Election;
(2) November 4, 1997 General Election;
(3) January 27, 1998 General Election;
(4) November 24, 1998 Primary Election; and
(5) January 19, 1999 Primary Election.

The results of these elections had been certified as valid by an independent Caucus Committee prior to the decisions to invalidate them.

The decision to void the January 1998 General Election results was challenged in the Tribal Court. The Tribal Court found, on the basis of tribal law only, that the TC did have the power to void the results based on protests claiming that persons with questionable membership voted. Phil Peters, Sue Durfee v. Kevin Chamberlain, et al., File No. 98-CI-361 at 44 (April 21, 1998). Further, the Tribal Court reasoned that determinations regarding elections are committed to the TC under the Constitution, and that it would be improper under the political question doctrine for that Court to intervene. Id. at 45-47. Nonetheless, the Tribal Court ordered the TC to develop a plan to allow the Tribe to proceed with an election. It later held the group in contempt for failing to develop adequate plans, but the order of contempt was rescinded by another judge, who then later recused himself.

On June 9, 1999, the Assistant Secretary of Indian Affairs at the U.S. Department of Interior,

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[1] Section 18 of the Election Ordinance No. 4 of 1991 provides:

> Any voter may protest an election for the district to which s/he voted. The written notice of protest must be made to the Tribal Council within seven (7) days after the election. The notice must set out the grounds of the protest. The Tribal Council shall schedule a hearing on the protest within ten days. The Tribal Council decision will be final.

Kevin Gover ("Gover"), sent a letter expressing his concern about the continuing membership dispute. Gover noted that the dispute had been used to justify nullifying the elections, and the Tribal Court had been unable to resolve it. Gover also urged the Chief to conduct an election within the next 45 days so that the Department of the Interior would know with whom to deal "for the purposes of maintaining the day-to-day government-to-government relationship with the Tribe." Finally, Gover warned that if the matter was not resolved, he would instruct area Department representatives to deal with the ten persons who received the highest number of votes in the January 1999 elections "on an interim basis until the next general election." That same day, Gover also sent a memo to staff indicating his intention to recognize eleven individuals from the 1999 election, since two of the candidates were tied for the tenth highest votes.

After Gover's letter, the TC scheduled another primary election for September 7, 1999.[2]

On August 10th, Gover released a decision stating that he was instructing Area representatives to implement the June 9th plan, since an election had not been held within 45 days. That same day, Plaintiff filed suit in Washington D.C., seeking a TRO. The Honorable Gladys Kessler denied Plaintiff's request. Plaintiff voluntarily dismissed that suit, and subsequently brought suit in this District. For the reasons stated on the record in open court on Wednesday, August 18, 1999, this Court denied Defendants' Motion to Transfer to the District Court for the District of Columbia.

III.

In determining whether a TRO should issue, the Court considers the following four factors: 1)

[2] That election apparently has been canceled by the newly recognized TC. A primary election is now scheduled for October, and a general election for November 1999.

Whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits; 2) Whether the plaintiff has shown irreparable injury; 3) Whether the issuance of a preliminary injunction would cause substantial harm to others; and 4) Whether the public interest would be served by issuing a preliminary injunction. Southerland v. Fritz, 955 F. Supp. 760, 761 (E.D. Mich. 1996); Fed R. Civ. P. 65 . The movant must show "serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." Friendship v. Michigan Brick, Inc., 679 F.2d 100, 105 (6th Cir. 1982). The four factors are generally balanced, rather than considered prerequisites. See Mascio v. Public Employees Retirement System of Ohio, 160 F.3d 310, 313 (6th Cir. 1998). "A district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue." Six Clinics Holding Corp., II v. Cafcomp Systems, Inc., 119 F.3d 393, 399 (6th Cir. 1997).

A. Likelihood of Success on the Merits

Turning to the first factor, the Court finds that Plaintiff has not shown a substantial likelihood of success on the merits. Plaintiff argues that it is likely to succeed on the merits of its dispute with the newly recognized TC, and that Defendants lack authority to require an election and/or to recognize the winners of the January, 1999 primary. However, both parties recognize that this Court has no jurisdiction to decide the underlying tribal dispute. See Runs After v. United States, 766 F.2d 347 (8th Cir. 1984) (district court did not have jurisdiction to resolve dispute involving interpretation of tribal constitution and law). Rather, the only question for the Court is whether Plaintiff is likely to succeed in demonstrating that the decision of the Department of the Interior was arbitrary and capricious. Goodface v. Goodrope, 708 F.2d 335, 337 (8th Cir. 1983); 5 U.S.C. § 706(2)(A).

Given the 8th Circuit's decision in Goodface, supra, this Court concludes that the decision to

recognize the new tribal counsel is not likely to be found arbitrary and capricious. In Goodface, the Court held that the BIA was mandated to conditionally recognize either the old or the new Tribal Council. 708 F.2d at 339. There, the Court held, equity favored recognition of the new council, since the election results had been certified. Id.

Here, even if equity favored the incumbent TC (because it had the power to resolve protests under the Election Code), it is unlikely that Plaintiff will be able to demonstrate that the Defendants' decision was arbitrary and capricious. The January primary outcome was certified by an independent body, the Caucus Committee. Further, in Goodface the court found that the Bureau of Indian Affairs could temporarily recognize the new tribal council where the parties had not yet sought a tribal remedy. Id. Here, Defendants took no action until after the Tribal Court had an opportunity to consider the election disputes and determined that it was a political question. Thus, the tribal court left these issues unresolved and, as counsel for Plaintiff acknowledged at oral argument, disputes over membership, and the manner in which elections are conducted, remain. In other words, Defendants were forced to make a choice, and certainly could not rely upon the Tribal Court to resolve the remaining disputes anytime soon.

In making its choice, the Defendants relied upon the fact that the incumbent TC had invalidated five elections since 1997, all of which had been certified by an independent body established pursuant to the Election Code; that the Tribal Court had ordered the incumbent TC to submit a plan and schedule for elections by December, 1998, which it had failed to adequately do, despite the issuance of contempt orders by the Tribal Court (later rescinded by a different tribal judge, who then recused himself); that in the January election none of the incumbents finished among the top 20 votegetters; that the incumbent TC had remained in office 21 months beyond the end of their term of office; that the

General Counsel for the Plaintiff Tribe had opined in November of 1997 that the incumbent TC had to effect a "transfer of power to a new, lawfully elected Tribal Council ...without delay" (Memorandum of Michael Phelan dated August 11, 1999, Appendix E to Federal Defendants' Oppositiion at 3); and, that the General Counsel to the Tribe had opined that the incumbent TC members were acting in clear violation of the Tribe Constitution in failing or refusing to hold elections and transfer power (See Appendix E to Federal Defendants' Opposition).

The Court recognizes that this case does not stand on all fours with Goodface, inasmuch as the Constitution here apparently allows the TC to override the certification of the independent Caucus Committee. However, Defendants were clearly bound to recognize one group or another, and in light of Goodface, the choice to recognize the independently certified primary winners does not appear arbitrary or capricious. Indeed, Defendants' choice was apparently based on its consideration of several factors, not the least of which is the fact that the Tribal Court had not successfully resolved the dispute. While federal law is clear that the government has no authority to take action contrary to tribal resolution of internal disputes, this bright line can only be drawn when an independent tribal forum is available. Wheeler v. United States Department of the Interior, 811 F.2d 549, 553 (10th Cir. 1987).

In the present case, given the decision of the Tribal Court, Defendants could reasonably doubt whether there was a tribal forum available that would act to resolve election disputes. Thus, in light of all the circumstances, the difficult choice to recognize the winners of the 1999 primary on an interim basis until the next general election is held is not likely to be found arbitrary or capricious. Accordingly, Plaintiff cannot establish a likelihood of success on the merits.

B. Irreparable Harm

Turning to the second factor, the Court finds that Plaintiff has not made a convincing showing

that an injunction is needed to prevent irreparable harm to the Tribe. Admittedly, if the incumbent TC is legally in power, then the Gover designees are depriving them of their right to govern and may be making decisions contrary to those that the incumbent TC would make. Moreover, the failure to enjoin recognition of the Gover designees will likely cause irreparable harm to the incumbent TC's ability to govern in the future, since the incumbent TC loses credibility each day it does not govern. Further, to the extent that the threat of violence persists, the harm to the Tribe may be substantial, as relations among its members dissolve.

However, the irreparable harm inquiry is complicated by the particular nature of this case. As both sides apparently recognize, the question of who is lawfully in power is an internal tribal matter, and this Court does not have jurisdiction to interpret the Tribal Constitution or decide election disputes. Since the Court is unable to determine whether the incumbent TC is lawfully in power, it cannot conclude with any certainty that the Tribe itself will actually suffer irreparable harm should an injunction not issue. To the extent that an injunction assists the wrong group, it could actually cause, rather than prevent, irreparable harm. Thus, while Plaintiff has demonstrated that the incumbent TC may suffer irreparable harm without an injunction, it is less than clear whether the Tribe itself would also suffer. Accordingly, the Court cannot conclude that this factor weighs strongly in Plaintiff's favor.

C. Balance of the Harms and Public Interest

The final two factors – balance of the harms and public interest -- do not point clearly in any direction. The issuance of an injunction would clearly help the incumbent TC, but it is unclear to what extent it would injure others. Again, since this Court cannot resolve the underlying election dispute, it is difficult to determine to what extent an injunction would wrongfully force Defendants to recognize the

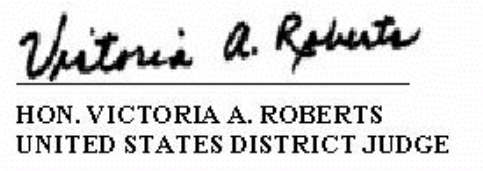
incumbent TC. Additionally, given the ongoing disputes, an injunction would likely disrupt Defendants' efforts to maintain consistent federal-tribal relations.

Finally, it is in the public interest to allow the Tribe to resolve it's own internal disputes, but it is also in the public interest for the federal government to have a cognizable tribal council. As such, neither of these factors persuasively favors the issuance of the injunction.

IV.

In sum, the Court finds that the balance of factors weigh in favor of denying the injunction. While the incumbent TC may suffer irreparable harm if it is not recognized by Defendants, the harm, if any, to the Tribe is less than clear. Furthermore, Plaintiff cannot demonstrate a substantial likelihood of success on the merits, and the remaining factors do not strongly point in either direction. Accordingly, Plaintiff's Motion is **DENIED**.

IT IS SO ORDERED.



HON. VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

dated: 8/19/99